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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

VIOLETTE MANSOOR, an individual,

Plaintiff,

v.

AIR FRANCE KLM AIRLINES, a
corporation,

Defendant.

Case No. 08 CV 0828 JM RBB

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFF VIOLETTE MANSOOR'S
OPPOSITION TO DEFENDANT'S
MOTION TO DISMISS FOR FAILURE TO
STATE A CLAIM UPON WHICH RELIEF
CAN BE GRANTED (FRCP 12(b)(6))**

Judge: Hon. Jeffrey T. Miller
Magistrate: Judge Ruben B. Brooks

Date: September 26, 2008
Time: 1:30 p.m.
Courtroom: 6

Plaintiff Violette Mansoor hereby provides the following Memorandum of Points and
Authorities in Support of her Opposition to Defendant's Motion to Dismiss for Failure to State a
Claim Upon Which Relief Can Be Granted:

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I. OVERVIEW

Plaintiff Violette Mansoor brought this action for personal injuries sustained aboard Air France Flight 307 while traveling from Hartsfield Jackson International Airport, Atlanta, Georgia, to Charles de Gaulle International Airport, Paris, France, on May 10, 2006. Approximately four hours before arrival in Paris, Mrs. Mansoor tripped on a loose impediment in the aisle while en route to the lavatory causing her to fracture her left hip and break her right arm. For four hours, Ms. Mansoor suffered excruciating pain while awaiting the plane's arrival in Paris. Upon landing, Ms. Mansoor was taken to the hospital where she underwent extensive surgery. Several weeks later, Ms. Mansoor was forced to endure additional treatment and physical therapy and has since suffered from constant pain and anguish as a result of the injuries she sustained.

On May 7, 2008, Plaintiff filed a complaint against Defendant Air France alleging "Personal Injuries Pursuant to Articles 17 and 21 of the Montreal Convention 1999." (Complaint at 5:5). After an unsuccessful attempt at mediation, Defendant filed the present Motion to Dismiss premising its argument on the ground that "courts have repeatedly dismissed claims involving trips and falls on aircraft, even when over objects in the aisles, on the basis that those are not 'unexpected or unusual events' within the meaning of the Convention." (Defendant's Motion at 2:4-6).

Defendant's Motion to Dismiss fails in that Plaintiff's Complaint alleges facts sufficient to state a legally cognizable claim. More particularly, Plaintiff has alleged the occurrence of an accident onboard Defendant's aircraft that caused Plaintiff substantial bodily injury, thus mandating relief under Article 17 of the Montreal Convention. Denial of Defendant's Motion is further warranted given that Defendant's argument derives from two unreported cases from the Southern District of New York that are neither legally binding nor serve as sound precedent for this court.

II. FACTUAL BACKGROUND

On May 10, 2006, 79-year-old Mrs. Mansoor was traveling aboard Air France Flight 307 from Hartsfield Jackson International Airport, Atlanta, Georgia, to Charles de Gaulle International Airport, Paris, France en route to the Emirate of Dubai for her granddaughter's

wedding. Approximately four hours before the plane's arrival in Paris, Mrs. Mansoor stood up to use the lavatory. While walking down the aisle, she tripped and fell on an unidentified loose item in the aisle causing a fracture of her left hip and a break in her upper right arm. When on-flight physician Dr. Strange came to Mrs. Mansoor's assistance, she was conscious and described the incident to him in great detail, in part explaining that she tried to avoid hitting her head on any hard objects as she fell. Both Dr. Strange and Mrs. Mansoor attribute the fall to "an accident" and not to a lack of consciousness. Despite Dr. Strange's assistance, Mrs. Mansoor suffered from the overwhelming pain of her injuries for the remaining four hours of flight.

Upon landing in Paris, Mrs. Mansoor was transported by ambulance to Robert Ballanger Hospital. Her broken arm was treated and she underwent emergency surgery to mitigate further damages to her fractured hip. The shock of her injuries along with the insurmountable language barrier rendered her unable to communicate with those around her. Fearful and alone she remained under the hospital's care until June 2, 2006. During Mrs. Mansoor's twenty-three day long stay in the hospital, she was assured that Air France would provide complimentary passage for her and a companion back to San Diego, California. When Mrs. Mansoor and her daughter-in-law, who had come from San Diego to assist her, arrived at Charles de Gaulle International Airport to return home, they suffered the additional indignity of having Air France disclaim any knowledge of their earlier promise of free travel back to San Diego. Mrs. Mansoor was forced to purchase two return flight tickets at a combined premium fare rate of \$18,693.96 USD.

Immediately upon her return to San Diego, Mrs. Mansoor was admitted to Villa Las Palmas Healthcare Facility, where she underwent three weeks of extensive treatment and physical therapy for her injured arm, shoulder, and hip. Mrs. Mansoor is now restricted to walking with the assistance of a cane and requires continuing rehabilitation services to combat the ongoing, painful symptoms caused solely by her accident aboard Air France Flight 307.

III. LEGAL STANDARD

A. MOTION TO DISMISS

A motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) "is viewed with disfavor and is rarely granted." Lowrey v. Texas A & M Univ. Sys.,

1 117 F.3d 242, 247 (5th Cir. 1997). In making its determination, the court accepts the allegations
 2 in the complaint as true and draws all reasonable inferences in a light most favorable to the
 3 plaintiff. Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 109 (1979); Warth v. Seldin,
 4 422 U.S. 490, 501 (1975); Conley v. Gibson, 355 U.S. 41, 48 (1957); Wright & Miller, Federal
 5 Practice & Procedure §1350, p. 551; *see also* Jenkins v. McKeithen, 395 U.S. 411, 421 (1969);
 6 Beedle v. Wilson, 422 F.3d 1059, 1063 (10th Cir.2005).

7 The pleading requirement in federal court is often referred to as “notice pleading” and is
 8 captured in Article 3, Rule 8(a) of the Federal Rules of Civil Procedure, which requires that a
 9 pleading stating a claim for relief must contain, in part, “a short and plain statement of the claim
 10 showing that the pleader is entitled to relief.” As it relates to motions to dismiss, the Supreme
 11 Court recently decided that the inquiry should be whether the complaint contains “enough facts to
 12 state a claim to relief that is plausible on its face.” Bell Atlantic Corp. v. Twombly, 550 U.S. ____
 13 127 S.Ct. 1955, 1969, 1974, (2007). Under this standard, a “plaintiff must ‘nudge [] [his] claims
 14 across the line from conceivable to plausible’ in order to survive a motion to dismiss.” Ridge at
 15 Red Hawk, L.L.C. v. Schneider, 493 F.3d 1174, 1177 (10th Cir. 2007) (*quoting* Bell Atlantic, 127
 16 S.Ct. at 1974).

17 Plausibility, however, “does not impose a probability requirement at the pleading stage; it
 18 simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence”
 19 to support the plaintiff’s claim. Bell Atlantic, 127 S.Ct. at 1965. The court will dismiss a
 20 complaint for failure to state a claim only if it “‘appears beyond doubt that the plaintiff can prove
 21 no set of facts in support of his claim which would entitle him to relief.’” Hamlin v. Vaudenberg,
 22 95 F.3d 580, 583 (7th Cir.1996) (*quoting* Conley, 355 U.S. at 45-46); Swierkiewicz v. Sorema
 23 N.A., 534 U.S. 506, 514 (2002) (“A court may dismiss a complaint only if it is clear that no relief
 24 could be granted under any set of facts that could be proved consistent with the allegations.”). A
 25 Plaintiff’s brief may always be used “to clarify allegations in her complaint whose meaning is
 26 unclear.” Pegram v. Herdrich (2000) 530 U.S. 211, 230. Thus, when evaluating a motion to
 27 dismiss, the court is tasked only with the responsibility of determining the sufficiency of the
 28 complaint and not the merits of the lawsuit. Fed.R.Civ.P. 12(b)(6); United States v. Clark

County, Ind., 113 F.Supp.2d 1286, 1290 (S .D. Ind.2000); Mallett v. Wisconsin Div. of Vocational Rehabilitation, 130 F.3d 1245, 1248 (7th Cir.1997); Porter v. DiBlasio, 93 F.3d 301, 305 (7th Cir.1996). 211, 230, fn. 10. When evaluating whether leave to amend is appropriate, “new” facts in Plaintiff’s opposition must be considered to determine if to grant leave to amend or to dismiss with or without prejudice. Orion Tire Corp. v. Goodyear Tire & Rubber Co. (9th Cir. 2001) 268 F.3d 1133, 1137. As will be shown, Plaintiff’s complaint sufficiently states a cause of action for personal injuries pursuant to Articles 17 and 21 of the Montreal Convention 1999 such that Defendant’s Motion should be denied.

B. CAUSE OF ACTION

Although Defendant’s Motion alleges it is “not entirely clear whether the Complaint means to impose any state law claims,” Plaintiff’s Complaint clearly refrains from implicating any legal theories premised on state law. (Defendant’s Motion at 2:24-25). In fact, Plaintiff’s Complaint makes no reference to state law and emphatically asserts that “Pursuant to the provisions of Article 17 of the Montreal Convention 1999, the defendant is liable for damages sustained by the plaintiff as a result of the injuries she suffered as a result of the accident onboard Flight 307 on May 10, 2006.” (Complaint at 5:10-12). Defendant’s Motion to Dismiss is therefore restricted to an analysis solely with regard to Plaintiff’s cause of action pursuant to the rights and remedies set forth under the Montreal Convention.

IV. ARGUMENT

A. PLAINTIFF’S COMPLAINT PLEADS FACTS SUFFICIENT TO STATE A CAUSE OF ACTION UNDER ARTICLES 17 AND 21 OF THE MONTREAL CONVENTION

Plaintiff’s Complaint properly pleads facts sufficient to state a cause of action pertaining to bodily injuries sustained by Plaintiff from the occurrence of an accident onboard Defendant’s aircraft. As Defendant correctly notes, Article 17 of the Montreal Convention governs such claims and “applies to any personal injury or death occurring onboard an aircraft while the passenger is either boarding, traveling onboard or disembarking.” (Defendant’s Motion at 2:20-22); *See also* Montreal Convention, art. 17(1). Article 21 imposes strict liability on a carrier in an amount not to exceed 100,000 Special Drawing Rights (“SDR”) for death or bodily injury

1 sustained by a passenger caused by an accident onboard the aircraft. Montreal Convention, art.
 2 17(1) & 21. To the extent that the passenger's damages exceed 100,000 SDR, the carrier is
 3 absolved from liability if "the carrier proves that: (a) such damage was not due to the negligence
 4 or other wrongful act or omission of the carrier or its servants or agents; or (b) such damage was
 5 solely due to the negligence or other wrongful act or omission of a third party." Montreal
 6 Convention, art. 21.

7 ***1. Plaintiff's Complaint properly alleges the occurrence of an "accident"***
 8 ***as defined by Article 17 of the Montreal Convention***

9 In the seminal Supreme Court case interpreting Article 17 of the Montreal Convention, the
 10 Court noted that the word "accident" is usually defined as a "fortuitous, unexpected, unusual, or
 11 unintended event." Air France v. Saks, 470 U.S. 392, 405 (1985). The primary requirement
 12 necessary to implicate the provisions of Article 17 is that the accident is the cause of the injury
 13 rather than the injury itself being an accident. *Id.* at 399 ("The text of the Convention thus
 14 implies that, however we define 'accident,' it is the *cause* of the injury that must satisfy the
 15 definition rather than the occurrence of the injury alone."). This definition, the Court stressed,
 16 "should be flexibly applied after assessment of all the circumstances surrounding a passenger's
 17 injuries." *Id.* at 405. "In cases where there is contradictory evidence, it is for the trier of fact to
 18 decide whether an 'accident' as here defined caused the passenger's injury." *Id.*

19 Defendant deceptively claims that "As the cases have made clear, an 'accident' is not
 20 merely an abnormal reaction of a passenger to some ordinary condition or happening; rather, it
 21 must [sic] the result of abnormal or unusual operation of the aircraft." (Defendant's Motion at
 22 3:13-15). Notably, however, this restrictive interpretation, has never been adopted by the Ninth
 23 Circuit. Gezzi v. British Airways PLC, 991 F. 2d 603, fn. 4 (9th Cir. 1993). In fact, when
 24 specifically addressing this issue, the Ninth Circuit noted that "[this] suggestion was never
 25 included in the text of the Warsaw Convention." *Id.* The Gezzi court thus emphasized that
 26 "Article 17 requires only that the 'accident' take place 'on board the aircraft or in the course of
 27 any of the operations of embarking or disembarking.'" *Id.*

28 Under the Saks framework, a plaintiff pursuing an Article 17 claim must show that her

injury was caused by “(1) an external event; (2) that was unusual or unexpected; and (3) took place during the operation of the aircraft.” Wiprank v. Air Canada (C.D. Cal. May 15, 2007) 2007 WL 2441066 (Plaintiff’s Complaint, which alleged that she suffered second and third degree burns from tea that spilled on her lap and legs after another passenger reclined the seat in front of her, was sufficient to defeat Defendant’s Motion for Summary Judgment as it pertained to the issue of “accident”). Inline with these guidelines, Plaintiff has clearly pled facts sufficient to allege the occurrence of an “accident” as defined by Article 17 of the Montreal Convention. In particular, the Complaint states, “Plaintiff’s injuries alleged herein resulted from an accident on board the defendant’s aircraft in the course of international carriage within the meaning of the Montreal Convention.” (Complaint at 3:24-26). Plaintiff further incorporates the necessary “fortuitous, unusual, unexpected or unintended element” by alleging that “During Air France Flight 307 from Atlanta to Paris on May 10, 2006, the plaintiff sustained serious personal injuries when she tripped and fell as a result of a hazard in the walkway onboard the aircraft.” (Complaint at 5:1-3). Additionally, Plaintiff repeatedly indicates that the serious injuries she sustained were “the result of an accident,” thus properly implicating Article 17’s provisions. (Complaint at 3:24; 5:8, 14).

In addition to the language contained in Plaintiff’s Complaint itself, which expressly detail the occurrence of an accident giving rise to Plaintiff’s injuries, three cases are particularly instructive. As in Gezzi, the Ninth Circuit has concluded that the presence of a hazard constitutes an “accident” within the meaning of the Montreal Convention as it is “‘unexpected or unusual’ and ‘external to’” to Plaintiff. Gezzi 991 F.2d at 605 (the presence of the water on the stairs that caused Gezzi to fall and slide to the bottom as he descended “qualifies as an ‘accident’ because it was both ‘unexpected or unusual’ and ‘external to’ Gezzi.”).¹ Moreover, in Kwon v. Singapore Airlines, 356 F.Supp.2d 1041, 1044-45 (N.D.Cal.2003), the court concluded it was an “accident” when Plaintiff’s toe was injured after another passenger, struggling to put her luggage in an overhead bin, tripped and stepped on his foot. Similarly, falling liquor bottles from an overhead

¹ Defendant improperly misguides the court by wrongly asserting that Plaintiff “allegedly fell over her own feet or someone else’s” in its unsuccessful attempt to distinguish Gezzi.

bin causing bodily injury to a fellow passenger have also been deemed an “accident” under Article 17’s guidelines. Maxwell v. Aer Lingus, Ltd., 122 F. Supp.2d 210, 212-13 (D.Mass. 2000) (court held that “[i]n weighing the vicissitudes of modern day air travel, the hazard of being struck by a falling bottle surely ranks on a par with that of being bumped by a stumbling drunk or a reclining seat, events that have been found to be an Article 17 ‘accident.’”).

In support of its position that “courts have routinely dismissed claims contending that tripping over objects in the walkway or surrounding passengers’ seats constitutes an accident,” Defendant relies upon two unreported cases, citation to which is often looked upon with disfavor. Both cases originate from the Southern District of New York and thus clearly have no binding effect or precedential value to this court.

Notably, the single case Defendant cites in support of its Motion, Potter v. Delta Airlines (5th Cir. 1996) 98 F.3d 881, is distinguishable. In Potter, the court’s decision rested on the fact that Mrs. Potter twisted her knee as she turned to enter the row and sit down. Unlike the case at hand, no mention is made nor is any consideration given to whether a hazard or other loose impediment caused Mrs. Potter’s injuries. The presence of a hazard, on the other hand, constitutes an unexpected occurrence and therefore gives rise to the classification of Plaintiff’s fall as an “accident.” *See, e.g., Gezzi, supra*, 991 F. 2d 603.

2. *Plaintiff’s Complaint states facts sufficient to allege a causal connection between Plaintiff’s injuries and the accident*

In addition to stating facts sufficient to allege an “accident”, Plaintiff has also pled the facts necessary to establish the causal element between the occurrence of the accident and Plaintiff’s bodily injuries. Although Defendant refrains from addressing this point, brief reference to Plaintiff’s allegations further reinforces the merits of Plaintiff’s Complaint and prayer for relief. More specifically, Plaintiff’s Complaint, on numerous occasions, states that the “injuries alleged herein resulted from an accident on board the defendant’s aircraft in the course of international carriage within the meaning of the Montreal Convention.” (Complaint at 3:24-26; 5:14-20, 24-26; 6:1-21). Plaintiff’s Complaint additionally details Defendant’s negligence as it relates to Plaintiff’s injuries, specifically asserting that Defendant “(a) Fail[ed] to take

1 necessary precautions to anticipate the conditions that cause the hazardous condition onboard
 2 Flight 307...(b) Fail[ed] to avoid the hazardous conditions that caused the plaintiff's accident
 3 onboard Flight 307 that resulted in plaintiff's injury; and (c) Faile[ed] to warn the plaintiff of
 4 hazards in the walkway/aisle between the seats..." (Complaint at 6:3-11). Plaintiff's Complaint
 5 thus properly alleges both the occurrence of an accident and the causal connection to Plaintiff's
 6 bodily injuries such that Defendant's Motion should be denied.

7 Policy further dictates a decision in Plaintiff's favor. Kwon, *supra*, 356 F.Supp.2d at
 8 1044-45. In Kwon, the court noted, "It is also hard to see what policy is advanced by absolving
 9 an airline of responsibility for such "garden variety" torts which occur on airplanes. It neither
 10 compensates the injured passenger nor provides any incentive for the airline to attempt to avoid
 11 'common' accidents." It is clear from Plaintiff's Complaint that the necessary elements needed to
 12 establish the occurrence of an "accident" within the meaning of the Montreal Convention have
 13 been properly alleged. Plaintiff has thus more than "nudge[d] [] [her] claims across the line from
 14 conceivable to plausible" entitling her to relief under the protections afforded by the Montreal
 15 Convention. Ridge at Red Hawk, L.L.C., *supra*, 493 F.3d at 1177 (*quoting Bell Atlantic*, 127
 16 S.Ct. at 1974). In any event, even if the court deems otherwise, "[i]n cases where there is
 17 contradictory evidence, it is for the trier of fact to decide whether an 'accident' as here defined
 18 caused the passenger's injury," such that granting Defendant's Motion to Dismiss would be
 19 improper. DeMarines, *supra*, 580 F.2d 1193 (3rd Cir. 1978).

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V. CONCLUSION

Under the standards governing motions to dismiss and applicable law regarding claims predicated on Article 17 of the Montreal Convention, Plaintiff's Complaint properly alleges facts sufficient to state a cause of action for bodily injury caused by an accident onboard Defendant's aircraft. In the alternative, Plaintiff submits that has demonstrated the ability to include more specificity in the Complaint which would at least justify an order allowing leave to amend.

Dated: August 28, 2008

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